

BRIEF NOTES ON THE PRINCIPLE OF THE PUBLICITY OF JUDGMENTS IN THE FEDERAL SUPREME COURT OF BRAZIL AND IN THE UNITED STATES SUPREME COURT

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Two centuries separate our Federal Constitution (1988) – an analytical constitution – from the United States Constitution (1787), a concise document.

The American Constitution, which employs the technique of saying as little as possible, dedicates only one article to Judicial Power. In Section I, Article III, there is reference to only *one supreme Court*. It gives the ordinary legislature (Congress) the power of creation and alteration, as well as the power to extinguish other federal courts (*inferior Courts*). Generally stated, it guarantees the judges permanency in their position and an irreducible salary¹. One can see that the Philadelphia Statute establishes principles. There are two highly significant principles: greater protection for the plaintiff and for the defendant than for the judge as well as security from political manipulation. The American Constitution, generally stated, is not concerned with the norm of complementary principles². Furthermore, there are constitutional principles present that cannot be found explicitly in the political text.

¹ Art. III, § I: The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

² The distinction between “principle” and “norm” is not pacific (See GOMES CANOTILHO, José Joaquim. *Direito Constitucional*. 4. ed. Coimbra: Livraria Almedina, 1987, p. 119).

Throughout the years, notably since *Marbury v. Madison* (1803)³, it has been the duty of the Judiciary and, in particular, the Supreme Court, to interpret and apply laws while adhering to the Constitution. In relation to this "Silent Constitution" and to the concision of many of its expressive clauses⁴, the judicial courts take on the difficult responsibility of strengthening constitutional principles and norms, though often faced with contradiction and disharmony.

The Brazilian Constituency of 1988, while legislating for other people from other lands and other times, did not made constitutional law the principles, but also the norms of secondary nature. The historical-political exigency, in truth, had already changed. The time was different.

In the "General Dispositions" of the chapter referring to "Judiciary Power", through ways previously drawn up in the *caput* of article 37, our Constitution states in article 93:

IX – all judgments of the bodies of the Judicial Power shall be public, and all the decisions shall be justified, under penalty of nullity, and the law may, if the public interest demands it, limit the presence, in given acts, to the interested parties and their lawyers, or only to the latter.

There is no doubt that the text transcribed above has a large political and democratic significance. There is a historical explanation: the majority of judges in the 18th century were arbitrary and corrupt.⁵ In France, for example, the judges of the *Ancien Régime* were "owners" of their positions. Due to this, they could sell or bequeath these positions.⁶

³ Unquestionably, *Marbury* is a one of the most important rulings of the Supreme Court. It is treated as a "super-precedent" that acquired constitutional *status* (See TRIBE, Laurence H. *The Invisible Constitution*. New York: Oxford University Press, 2008, p. 19).

⁴ Such as the *religious* and *free speech clauses* of the First Amendment.

⁵ Beccaria (1738-1794), in his time, was one of the paladins against the judiciary system.

⁶ See DAVID, René. *Os Grandes Sistemas do Direito Contemporâneo*. 2. ed. Trad. Hermínio A. Carvalho. Lisboa: Editora Meridiano, Limitada, p. 156. See GODECHOT, Jacques. *A Revolução Francesa: Cronologia Comentada (1787-1791)*. Trad. Julieta Leite. Rio de Janeiro: Nova Fronteira, 1989, p. 19. On February 23, 1771, the chancellor Maupeou (1714-1792) implemented a provision that extinguished the privacy of the

Our monk Vicente do Salvador (1546-1639), in reference to the conduct of “Land Judges” (ordinary elected judges), affirmed that to obtain favors you need only “four boxes of sugar to bend the Rod of Justice”.⁷ From this we see the value of the exigencies of the Brazilian constitutional device, insuring the transparency of public acts and, especially, the judges’ decisions. It is probable that our Constitution of 1988 was directly based on the principle of the publicity of public acts and of the publicity of court hearings, both clearly acclaimed in the Constitution of the Portuguese Republic (art. 122nd, *g*, and art. 209th, respectively). With the publicity of judicial acts in hearings and official journals, political arcana are avoided: judicial decisions, save in exceptional cases provided by law, cannot be kept secret. All parties have the right to know the decisions that are reached. Therefore, the judgments are divulged, not only in the interest of those involved, but also in the interest of society as a whole. On the other hand, the principle of juridical security is also an issue. In the case of the North American Constitution – the paradigm of all existing constitutions – all responsibility belongs to the ordinary legislature and to the judiciary itself, both of whom directly know how to evaluate and regulate present-day social pressures. In the case of the Supreme Court – the only court with constitutional status –, its *Rules* detail the procedural norms.⁸ There are many devices of customary law. One of these devices, which would suffer as unconstitutional in Brazil, as it goes against the “principle of ample publicity”, is in the delivery of the judgment. On one side, the lawyers defend their clients openly before the Court *en banc* (*Rule 28, I*), but afterwards, the judgment takes place in secret, far from the public eye. It actually takes place behind closed doors. Disagreement and animosity between judges is inevitable in the heat of discussion, but it

judge’s position (Parliament). Provisions should be made by the government. On November 12, 1774, Louis XVI restored the privileges (See GODECHOT, cit. work, p. 28).

⁷ Apud GUIMARAES, Mário. *O Juiz e a Função Jurisdicional* 1 ed. Rio: Forense, 1958, p. 31.

⁸ The *U.S. Supreme Court Rules* pass through periodic alterations. The revision of July 17, 2007 was enforced on October 1, 2007.

then dies between the *Brethren*.⁹ It does not go beyond this point. Even the *Clerk of the Court* is not present at the sessions taking place in the conference room. Distrust? No, precaution and prudence! Curiously, there are rules that have a comic flavor: the *conference room* door stays locked, and if anyone, for any reason, knocks on this door, it is the job of the Junior Associate Justice to answer...¹⁰ Once the judicial issue is resolved, the result is summarized and, finally, disclosed (*Rule 41*). Some publicity has occurred, but in a restricted form.

American democracy – an English inheritance – has a religious base. It was built between equals,¹¹ and it gradually solidified through patience and caution. Our democracy took on a different form, and due to antecedent autocrats,¹² there were a series of intermittencies. Because of this, our democratic manifestations are more pronounced and even more radical. I will present two examples, past and present.

During the elaboration of the Philadelphia Constitution (1787), the secrecy of the discussions between the delegates was one of the first

⁹ Often, disagreements have a more profound basis. This occurred with the sullen and prejudiced *Justice* McReynolds (1862-1946), who did not tolerate liberal judges and was extremely anti-Semitic. He refused to speak to his colleague *Justice* Brandeis (1856-1941). His racism was so pronounced that, for the official Court photograph in 1924, he refused to attend so as to avoid being near Brandeis. The Chief Justice of the Supreme Court simply cancelled the photo session... (See ABRAHAM, Henry J. *The Judicial Process: an Introductory Analysis of the Courts of the United States, England, and France*. 5. ed. New York: Oxford University Press, 1986, p. 206). The hatred of James C. McReynolds returned in 1939: he did not attend the Robing Ceremony of Felix Frankfurter (ibidem, p. 207). He decided not to speak to Benjamin Cardozo, *another Jew*...

¹⁰ See SCHWARTZ, Bernard. *A History of the Supreme Court*. New York: Oxford University Press, 1993, p. 319.

¹¹ Octavio Paz, a Mexican intellectual essayist, made a profound observation about Spanish Catholicism and English Protestantism during the time of the American colonization. English society was "exclusive", Spanish "inclusive". During this dominance, the Englishman was not interested in converting the natives. He wanted separation, and even elimination. What resulted was the construction of a society between equals; already the Spaniard (due to the Portuguese colonizer) was preoccupied with conversion, establishing a strong hierarchy between the conquerors and the conquered (*Tempos Nublados*. Trad. Sônia Régis. Rio de Janeiro: Editora Guanabara, 1983, p. 190).

¹² The Brazilian State was not born in a liberal environment. "Born and lulled to sleep, most appropriately, beneath the sign of illustrated absolutism" (NEVES, Lúcia Maria Bastos Pereira das. *Corcundas e Constitucionais: a Cultura Política da Independência (1820-1822)*. Rio de Janeiro: Renavan, 2003, p. 418).

rules established. The delegates feared that if the public had access to the process of the convention, they would not understand the true nature of the discussions and would become politically embittered. James Madison, by this time thirty-six years old, sat beside William Jackson, the official secretary of the constituency, and made daily notes following the discussions between his peers. While alive, Madison refused to make his notes public. In 1837, his widow sold them to the Library of Congress, but they were only disclosed (incomplete) five years later.

In Brazil, during the first Empire, the discussions between the constituents were noted in shorthand and disclosed immediately.¹³ This was sufficient for the young emperor D. Pedro I to close the General Constituency and Legislative Assembly.

The other example, recent, involves presenting the disclosures of major constitutional questions judged by the Federal Supreme Court, such as *Mensalão*, *Células-Tronco* and *Raposa Serra do Sol*, on television or *online*. There is no doubt that society needs to know what is happening in their justice courts; what is being discussed, supported, and decided. It is a legitimate exercise of citizenship and inspection of a non-elected power.

Here lies the question: until what point is it democratically good to have a judgment transmitted live on television if often times the judge is not in accordance with his colleagues? Does the public need to know the *interna corporis* disagreements or would it be more interesting for the institutions to have the same defense as the American courts?

¹³ See MENCK, José Theodoro Mascarenhas. *A Liberdade Religiosa e o Parlamento Imperial Brasileiro (1823-1889)*. Brasília: Editora Ser, 1996, p. 13.

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